Submitted with the Consent of the Parties

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1279

THE WILLIAMS & WILKINS CO.,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF AMICUS CURIAE OF THE AMERICAN LIBRARY ASSOCIATION

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BRIEF AMICUS CURIAE OF THE AMERICAN LIBRARY ASSOCIATION

QUESTION PRESENTED

The question to which the American Library Association (the "ALA") addresses itself (and to which it addressed itself in its previous *amicus curiae* briefs directed to Commissioner Davis and to the United States Court of Claims) is:

> Whether not-for-profit academic, research, and public libraries are liable for copyright infringement as a result of their long-standing practice of making single photocopies of portions of copyrighted works at the request

and for the use of readers engaged in scientific and scholarly research.

The instant case superficially presents the somewhat narrower question of liability of the United States for damages (but not an injunction) under 28 U.S.C. Section 1498(b) attributable to library photocopying. Yet, it has been uniformly recognized by Commissioner Davis, the Court of Claims, the parties, and all *amici* that the decision herein will have a profound effect on judicial treatment of all library photocopying[1] at least until Congress acts on the question of library photocopying—including the very serious potential of an injunctive bar against the time honored practice of copying from library materials for scientific and scholarly research purposes.

Commissioner Davis recommended that the case before him be decided in favor of the plaintiff-publisher, thereby advocating that library photocopying as currently practiced be held to constitute copyright infringement. However, the Court of Claims did not accept the Commissioner's recommendation and held that the library photocopying, as represented in the record before it, did not infringe the copyrights in which the plaintiff-publisher claimed ownership. Affirmance of the Court of Claims decision will offer significant protection to libraries in the fulfillment of their traditional role as disseminators of recorded knowledge in the interim before Congress specifically legislates protection for this role. Correspondingly, reversal will significantly disrupt established procedures for promoting scientific knowledge and research.

1. For example, Petitioner concedes, as it must (see Petitioner's Brief page 29; hereinafter "Pet. Br." followed by the page reference therein), that this case will constitute precedent whose potential and probable effect transcends the interests of the instant litigants.

INTEREST OF THE ALA

The ALA, founded in 1876, is a non-profit educational organization with its principal place of business located in Chicago, Illinois. Its membership includes libraries, librarians, library trustees, and members of the general public who are devoted to the development and improvement of library services in the United States.

The ALA is the chief spokesman for the modern library movement in North America and, to a considerable extent, throughout the world. Through its membership and its affiliation with its constituent state library associations, the ALA represents over 24,000 public, university, and special libraries, over 90,000 elementary and secondary school libraries and media centers, and over 120,000 librarians.

The primary objective of the ALA is "to promote library service of excellent quality freely available to all." The ALA has long considered the collections of American Libraries as a truly national resource—a resource to which all citizens should have access. Consistent with this view, the ALA has encouraged the development of a system of interlibrary loans under which the library resources of the country can be maximized and made nationally available. This system functions in accordance with the Interlibrary Loan Code,[2] which, by its

2. The ALA's NATIONAL INTERLIBRARY LOAN CODE, 1968, provides in relevant part as follows:

* * * * *

"On a national level interlibrary loan requests should be *restricted to materials which cannot be obtained readily* and at moderate cost *by other means*.

I. *Definition*

Interlibrary loans are transactions in which library materials *are made available* by one library to another for the use of an individual; for the purposes of this code they include the pro-

terms, provides for the protection of authors and publishers against abuse. Under this system the poorest, most remote community or library, in behalf of those it serves, can gain access

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vision of copies as substituted for loans of the original materials.

II. *Purpose*

The purpose of interlibrary loans is to make available *for research*, materials not owned by a given library, in the belief that the furtherance of knowledge is in the general interest. Interlibrary loan service *supplements* a library's resources by making available, for the use of an individual, materials from other libraries and not owned by the borrowing library.

III. *Responsibility of Borrowing Libraries*

1. It is assumed that each library will provide the resources to meet the study, instructional, informational, and normal research needs of its users, and that requests for materials from another library will be limited to unusual items which the borrowing library does not own and cannot readily obtain at moderate cost. Requests for individuals with academic affiliations should be limited to those materials needed for faculty and staff research, and the thesis and dissertation research of graduate students.
2. Thesis topics should be selected according to the resources on hand and should not require extensive borrowing from other libraries. If an individual needs to use a large number of items located in another library, he should make arrangements to use them at that library.

* * * * *

V. *Scope*

1. Any type of library material needed for the purpose of research may be requested on loan or in photocopy from another library. The lending library has the privilege of deciding in each case whether a particular item should or should not be provided, and whether the original or a copy should be sent.
2. Libraries should not ordinarily ask, however, to borrow the following types of materials:
   a. U.S. books in print of moderate cost
   b. Serials, when the particular item needed can be copied at a moderate cost
   c. Rare materials, including manuscripts
   d. Basic reference materials

* * * * *

to the collections of the great academic and public libraries. By reason of this system, scholarship is not dependent on geographical location or the wealth of any particular community or individual, and the intellectual resources of the nation are available to all who desire or need them.

This system of interlibrary loan is not new. The first Interlibrary Loan Code was adopted in 1917; the second in 1951; the third in 1952, and the current Code, see n.2 *supra*, was adopted in 1968. Through all of this development, the basic objective of maximizing national library resources and the manner of making those resources available have remained the same.

Since its inception, the system of interlibrary loan has operated on the understanding that a library is free to use a photocopy in lieu of lending the original in its collection. This was made clear in 1917 by the first Interlibrary Loan Code, which specifically stated:

VII. *Conditions of Loans*

* * * * *

2. The borrowing library is bound by any limitations on use imposed by the lending library. It is recommended to lending libraries that any limitations (such as "for use in library only") be based on the physical condition or the bibliographic character of the particular item rather than be imposed on all materials lent.

3. Unless specifically forbidden by the lending library, copying by the borrowing library is permitted provided that it is in accordance with copyright law and American Library Association policy.

VIII. *Placement of Requests*

1. Libraries should exhaust local resources and make an effort to locate copies through the use of bibliographical tools, union lists, and union catalogs. Requests should be made to one of the nearer institutions known to possess the desired material. Care should be taken, however, to avoid concentrating requests on a few libraries.

* * * * *

> When applying for a loan, if a photographic reproduction would be a satisfactory substitute, librarians should always state the fact.[3]

All subsequent revisions of the Code have made similar provision for photocopying in lieu of lending the original. Until Petitioner brought the present suit, the right of a library to substitute a photocopy for the original was unquestioned and unchallenged.

The use of photocopies in interlibrary loan transactions is and has always been primarily confined to those involving requests for articles from periodicals. A recent study of Interlibrary Loan Transactions shows that over 84% of requests for periodical articles are satisfied by photocopies and microforms, as compared with less than 3.9% of requests for monographs.[4] There are good reasons for this.

First, periodical publications are normally collected and bound by librarians. Hence, a single volume may contain issues spanning one or more years and containing hundreds and even thousands of articles. Libraries photocopy a requested article from a periodical instead of sending the bound volume in which the article is contained simply because the library cannot do otherwise and still fulfill the needs of its own users. To send the bound volume instead of the photocopy would be to make available one work at the expense of making unavailable the numerous other works contained in the bound volume.

Second, periodical publications are inherently more difficult to preserve than are monographs, since periodicals are generally printed on less durable paper and hence are more susceptible to damage. Moreover, periodicals, once damaged or destroyed, are significantly more difficult to replace than are monographs.

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3. CODE OF PRACTICE FOR INTERLIBRARY LOANS (Constituting Report for 1917 of the Committee on Co-ordination, C. H. Gould, Chairman); *ALA Bulletin* V.11, p. 271 et seq. (1917).

4. Palmour, Vernon E., A STUDY OF THE CHARACTERISTICS, COSTS, AND MAGNITUDE OF INTERLIBRARY LOANS IN ACADEMIC LIBRARIES, Table 4.15 at 44 (1972).

Libraries rarely attempt to preserve issues of more than a few of the periodicals to which they subscribe because of the burdensome cost and space commitments involved. Likewise, few individuals keep back issues of the periodicals to which they subscribe. Moreover, periodical publishers themselves are rarely able to fill orders for back issues.

Third, the use of photocopies in lieu of the original significantly expedites user access to desired material. Studies show that 61.2% of interlibrary loan requests are satisfied within ten days when photocopies are used as compared with only 43.3% for the same time period where the original work is lent.[5]

The present case and its potential effect on library photocopying, of course, is also of concern to libraries in their day-by-day service to scholars, researchers, and scientists. It is impractical and unrealistic for a library, both from an economic point of view and from an allocation of space perspective, to purchase countless duplicates of the journals and periodicals in its collections. The demand for any given periodical quite logically varies from month to month and indeed from day to day. To supply such an unpredictable demand with original copies and still maintain some degree of efficiency is quite obviously impossible. Moreover, periodicals and journals, with the exception of recent issues, cannot readily be replaced and in some cases can never be replaced. To deviate from the norm of supplying photocopies would necessitate continually risking loss or destruction of the original while depriving subsequent patrons of access to the journal during the loan period.

Clearly, both from the standpoints of the Interlibrary Loan Program and the day-by-day library function of making its resources available, unencumbered photocopying is an absolute necessity.

The interest of the ALA in the present case arises from the fact that a decision in favor of Petitioner would almost certainly make it impossible for nearly 85% of all interlibrary loan

5. Palmour, *supra* note 4, Table 4.21 at 48.

requests for periodical works to be satisfied and would impede the normal function of libraries serving their own patrons. For the reasons already stated, libraries simply will not loan their bound volumes of periodicals. Such a decision would, therefore, bring to a halt the day-by-day dissemination of articles within bound volumes of periodicals.

Should Petitioner prevail in its contention that the making of a photocopy in an interlibrary loan transaction or in response to a request by a patron of a local library is an infringement of copyright, libraries will have but three alternatives;

(1) refuse the request;

(2) risk a suit for infringement and provide a photocopy; or

(3) seek permission from the copyright owner to photocopy.

Of these alternatives, the only viable decision will be to refuse the request, and library utilization of previously copied materials will be subject to the whim of copyright proprietors.

Manifestly, libraries cannot risk a suit for infringement. As governmental or educational institutions on limited budgets, libraries must attempt to avoid litigation. In any event, no non-governmental library would dare expose itself to claims for statutory damages for infringement in respect of every interlibrary loan transaction or local transaction where a photocopy is necessary. Such exposure, even if limited to the statutory minimum, would exceed the annual budgets of many large libraries.

Nor can libraries realistically be expected to seek permission from the copyright proprietor to make a photocopy. The prodigious delays alone would be enough to dissuade many libraries from seeking permission, not to mention the administrative costs of staggering proportions which would necessarily be incurred. To secure such permissions and collect and account for royalties in respect of each transaction would most surely involve the

expenditure of dollars by the library to collect pennies for the copyright proprietor. For that reason alone, no matter how important the local need or the interlibrary loan may be, no library can be expected to continue its normal practices in a system, the cost or burden of which endangers its very existence.

What is involved in this case is a demand by Petitioner for recognition of its right to *absolutely prohibit* the making of photocopies for local requesting scholars as well as for interlibrary loan purposes by any library whose potential liability is not limited to "reasonable compensation". The fact that Petitioner seeks only "reasonable compensation" (royalties) from the United States in the instant suit is no comfort to the vast majority of ALA's members, since injunctive relief, which is unavailable in the present case, would be available—and will be sought—against non-governmental libraries. As applied to libraries which are not part of the Federal Government, a decision in favor of Petitioner would give it and all other copyright proprietors the absolute power to suppress access to their copyrighted works and consequently to much of the nation's library resources.

If the photocopying of a copyrighted work incident to an interlibrary loan transaction, for example, is deemed an infringement, the copyright proprietor may refuse to permit library photocopying on reasonable terms or, for that matter, on any terms at all. The Copyright Act of 1909 contains no provision for mandatory licensing of copyrighted writings corresponding to that for phonorecords. Should the copyright proprietor fail to respond to requests to photocopy, for whatever reason, access to the desired work will be limited to those having physical access to the library collection in which it is preserved.

The ALA submits that the Constitution did not intend the copyright monopoly to suppress access to works necessary "To promote the Progress of Science and useful Arts". Nor did the Congress, which adopted the Copyright Act of 1909, intend this result. The Copyright Act of 1909 must be construed to

achieve and not defeat the Constitutional purpose of promoting science and the useful arts. If there is to be a further expansion of the copyright monopoly, it should be accompanied by those delicate safeguards and balancing mechanisms which only the Congress can provide.

In the modern world, access to the information contained in periodical publications is essential to human progress. The interest of the ALA in this case is its interest in preserving such access. Unless, by its decision here, this Court protects the access to periodicals available through library photocopying, scholarship, research, and science will be confined to those few communities and institutions fortunate enough to possess sizeable library collections. Individual opportunity for contribution to science and the useful arts will then and thereafter become a function of economic concentration and geography. The goal of library collections as a single national resource available to all who need or desire access will be shattered, and the nation and its citizens will bear the loss.

SUMMARY OF ARGUMENT

A. The Constitutional purpose underlying the Copyright Act of 1909 is to promote science and the useful arts. Section 1(a) of that Act enumerates several "exclusive rights", the conferral of which creates in authors monopoly powers with respect to the exercise of those rights. Those monopoly powers are necessarily restricted as to their scope in order to further, rather than impede, the constitutional purpose for which they were conferred.

B. The legislative history surrounding the 1909 enactment of Section 1(a), as well as prevailing practices of that era and up to the present time, support a finding that library photocopying practices were intended to be, and have always been construed as being, outside the scope of the limited copyright monopoly. Present day library photocopying practices are distinguishable from earlier photocopying practices only in terms of the "quantity" of material being photocopied. That which was not intended to be, and has never been considered to be, within the scope of the limited copyright monopoly should not now be brought within its scope by judicial action merely because the "quantity" of materials being copied has increased.

C. What Petitioner argues for in the instant case is an *extension* of the copyright monopoly to cover a process whereby recorded knowledge is made available through a medium separate and distinct from that with which publishers are concerned. As noted in this Court's recent decisions in the cases of *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corporation* v. *Columbia Broadcasting Systems, Inc.*, ... U.S. ....., 39 L.Ed.2d 415 (1974), such an extension is made only after a compelling showing that the functions of the copyright owner and the alleged infringer are the same. That showing cannot be made here. As in the

Fortnightly and *Teleprompter* cases, all the library photocopying practices do is make access to printed journal articles available to those persons who could not otherwise obtain such access. Semantic niceties and quantitative considerations cannot overcome the functional distinction between publishing and library photocopying activities.

D. Library photocopying practices, if somehow deemed within the scope of the limited copyright monopoly, should nevertheless be excused as non-infringing in accordance with the doctrine of "fair use". Libraries merely do for researchers that which researchers themselves have always been entitled to do. As a practical matter, libraries are mere agents of researchers acting only in accordance with and at the requests of their principals.

Scientists, researchers, and scholars are entitled to assert the doctrine of fair use in defense of their practice of obtaining access to journal articles in the form of single copies for practical application in their work. The fair use doctrine is bottomed on policy which supports both limited copying for direct quotation in subsequent publications and total copying to facilitate access to, and practical application of, recorded knowledge for purposes of advancing science and the useful arts. The fair use exception involving limited copying for use in subsequent publications assumes access to copyrighted materials. Accordingly, access to, and practical application of, copyrighted materials has heretofore never been challenged, and this case therefore poses questions of first impression. Using the recognized copying for use in subsequent publications, single photocopying for purposes for access and practical application is *a fortiori* entitled to exception from a limited copyright monopoly.

E. Since scientists, researchers, and scholars are entitled to assert the fair use defense, the defense is not destroyed when libraries, who act as mere agents of these patrons, make single photocopies for them at their request. Libraries do

nothing more than enhance their patrons' access to recorded knowledge. To hold libraries liable for copyright infringement in respect of this traditional service would necessarily bring an end to library photocopying. Such a result would deprive researchers of their right to assert the fair use defense in the protection of their privilege of free access to, and practical application of, copyrighted materials.

F. A decision for Petitioner—that single photocopy practices of libraries constitute infringement—would bring an end to library photocopying practices and consequently greatly inhibit dissemination of and access to recorded knowledge. Petitioner's suggested licensing program is wholly unacceptable and would not avoid the foregoing consequences.

G. Congress is considering copyright revision statutes which will accommodate the competing interests presented in this case. It is inappropriate for this Court to undertake the legislative process of extending the limited copyright monopoly by bringing within its ambit that which is clearly beyond its reach.

ARGUMENT

Preliminary Statement

Petitioner argues that the challenged library photocopying practices are a *per se* violation of the Copyright Act of 1909. (Pet. Br. 22 *et seq.*) For Petitioner to prevail in this argument, this Court must be satisfied on two points: (1) that library photocopying *prima facie* infringes the monopoly granted to copyright owners under the Act; and (2) that, if there is a *prima facie* violation, the defense of fair use is inapplicable to excuse it.

The majority of the Court of Claims, not surprisingly, refused to accept the argument that a practice that had gone unchallenged from the inception of the Act until the institution of the present suit constituted a *per se* violation. (*Williams Wilkins Co.* v. *United States*, 487 F.2d 1345, 1353 (Ct.Cl. 1973)) And, in finding there was no violation *at all*, it held both that there was substantial doubt whether the challenged practice was within the ambit of the Act's limited monopoly, and that in any event the practice constituted a fair use. Its doubt as to the former point reinforced its conclusion on the latter.

POINT I

THE PREPARATION BY LIBRARIES OF SINGLE PHOTOCOPIES OF PORTIONS OF PERIODICALS AT THE REQUEST OF AND FOR THE USE OF SCIENTISTS, RESEARCHERS, AND SCHOLARS DOES NOT COME WITHIN THE AMBIT OF THE LIMITED MONOPOLY GRANTED PURSUANT TO THE COPYRIGHT ACT OF 1909

I. A. Introduction

Perhaps emboldened by the majority's failure fully to accept the proposition that traditional library photocopying is not within the ambit of the Copyright Act's limited monopoly,

Petitioner persists in ignoring this question and focuses instead on the "fair use" defense. Of course this is the position Petitioner must take if it is to succeed in its *per se* approach. But the "scope of monopoly" question is not so easily sidestepped. There has never been a judicial determination that library photocopying is a *prima facie* violation of the Copyright Act of 1909. That is a question of first impression in this Court. And, as will be seen from the discussion below, it is clear that this traditional practice was initially intended to be, and should remain, outside the scope of the Act.

Moreover, a determination that library photocopying practices are outside the scope of the Act is consistent with two recent decisions of this Court—*Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corporation* v. *Columbia Broadcasting Systems, Inc.*, ... U.S. ....., 39 L.Ed.2d 415 (1974). Applying this Court's reasoning in those cases (hereinafter "CATV cases") to the instant one, it is clear that library photocopying is beyond the Act's reach.

I. B. Library Photocopying Was Recognized as Beyond the Copyright Laws Before and After the 1909 Revision

To assess the meaning and reach of the "exclusive rights to print, reprint, publish, copy and vend" contained in Section 1(a) of the Copyright Act on which Petitioner relies, it is essential to consider the interpretation given those rights as they related to library photocopying activities before, during, and after the 1909 revision which resulted in the present Act. Prevailing interpretations of those exclusive rights over the years since 1900 are set forth in a series of "Rules"[6] updated and published from time to time by the Library of Congress.

Important to this history is the role of Dr. Herbert Putnam, who served as Librarian of Congress both before and after the

6. LIBRARY OF CONGRESS, *RULES AND PRACTICE GOVERNING THE USE AND ISSUE OF BOOKS* (eds. 1908, 1913, 1918, 1921, 1929, 1932, 1939).

enactment of the 1909 revision. His involvement began in 1905 when the Senate Committee on Patents, after receiving a Presidential message in December of 1905 requesting prompt action on needed copyright revisions, asked Dr. Putnam to call a conference with the Register of Copyrights for the purpose of discussing revision of the then existing Copyright Laws.[7] Pursuant to that request, conferences were convened, with authors, book publishers, periodical publishers, and representatives from libraries in attendance.

Following the conferences, the Register of Copyrights drafted a bill which was presented in open hearings to a joint committee of the House and Senate Committees on Patents during the First Session of the 59th Congress in June 1906.[8] Dr. Putnam presented the bill and served as its leading proponent before the joint committee.

The libraries objected to the original formulation because the practices prohibited in Section 1(b) thereof (see n. 8 *supra*) could be interpreted as reading upon their regularly provided services (including their photocopying services). Realizing its potential effect on normal library practices, the House Committee on Patents deleted Section 1(b), and with reference to its action stated:

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7. See Goldman, *THE HISTORY OF U.S.A. COPYRIGHT LAW REVISION 1901-1954*, 1-2 (1955).

8. LIBRARY OF CONGRESS, THE COPYRIGHT BILL: S. 6330, H.R. 19853, 59th Cong., 1st Sess. (Copyright Office, Library of Congress, Bulletin No. 12, 1906); Section 1 of H.R. 19853 and S. 6330 provided in pertinent part:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the copyright secured by this Act shall include the sole and exclusive right:
>
> (a) For the purposes set forth in subsection (b) hereof, to make any copy of any work or part thereof the subject of copyright under the provisions of this Act, or to abridge, adapt, or translate into another language or dialect any such work, or make any such version thereof;
>
> (b) To sell, distribute, exhibit, or let for hire, or offer or keep for sale, distribution, exhibition, or hire, any copy of any such work;

> It was insisted that this paragraph would prevent the purchaser of a copyrighted book from reselling it or lending it or giving it away or the letting for hire of any such book, thus putting an end to circulating libraries. Your committee believed that this section was susceptible of that construction and that under it a man might have only qualified title in the copyrighted books in his library. This entire paragraph was eliminated, and in this bill the phraseology of the existing law has been substantially reproduced . . . (H.R. REP. No. 7083, 59th Cong., 2d Sess. 8 (1907)).

Thus it is obvious that Congress was sensitive to the needs and desires of the libraries and had no intent to interfere with or change the then normal library practices, which permitted photocopying.

At about the same time, in 1908, photography was gaining popularity as a means to facilitate copying. In this setting, Dr. Putnam, the Librarian of Congress, was intimately familiar with the pending copyright revisions and presumably congressional intention with respect thereto, and he was instrumental in promulgation of the 1908 edition of the "Rules", which expressed the then existing library policy[9] on photography as follows:

> *Photographing.* Photographing is freely permitted. The permission extends to the building itself and any of its parts, including the mural decoration. *It extends to articles bearing claim of copyright,* but the Library gives no assurance that the photograph may be reproduced or republished or placed on sale. These are matters to be settled with the owner of the copyright. (Emphasis added.)

The legislative history concerning the 1909 Act is devoid of any suggestion that would support an inference contrary to that manifest from the foregoing background—that Congress did not intend for library photocopying to be covered by the

9. The Library policy on photography did not originate with the 1908 revision but rather appears to date back to at least 1901. *See* REPORT OF THE LIBRARIAN OF CONGRESS, at 208 (1901).

Act. It is virtually inconceivable that a Congress so sensitive to the interests of libraries would enact a Copyright Law which would affect the normal library practices of that time. Nor does it seem likely that Dr. Putnam, Librarian of Congress, would support inclusion of a provision contrary to the already published 1908 edition of the Library Rules.

Indeed, the actions of the Library of Congress under the direction of Dr. Putnam support precisely the opposite conclusion—that the language of Section 1(a) was not intended to, and did not, bring library photocopying within the ambit of the limited copyright monopoly.

That conclusion is further manifest from post-1909 actions of the Library of Congress. Rather than change the Rules governing "photographing" after passage of the Copyright Act (which it would logically have done if such practices had been made infringements under Section 1[a] of the Act), in 1913 the Library published a new edition,[10] in which rules regarding photocopying were broadened to include the following provision:

> Photo-duplicates of books, newspapers, maps, etc., can be furnished at a reasonable rate by means of a photostat, installed in the Chief Clerk's Office. Apply to the Chief Clerk for a schedule of charges.[11]

Thus, it is clear that the Library of Congress, whose librarian, Dr. Putnam, piloted passage of the Copyright Act of 1909, did not consider its photocopying practices to be inconsistent with the "exclusive rights" conferred on authors by Section 1(a) of that Act.

The provisions of the 1913 edition of the Rules were continued in essentially the same form for three decades, until 1939 when Dr. Putnam retired from his post as Librarian.

10. LIBRARY OF CONGRESS, *RULES AND PRACTICE GOVERNING THE USE AND ISSUE OF BOOKS* (1913). The Library's staff reports there was a 1911 edition, but to the ALA's knowledge no copy of this publication has been located.

11. *Id.*

Dr. Putnam's departure from the Library was commemorated by the American Council of Learned Societies, which, in praising his work at the Library, stated:

> You have led in adapting the most modern photographic processes to the needs of the scholar, and have . . . made widely available for purposes of research copies of your own collections . . .[12]

A majority of the Court below characterized the foregoing summary of significant events extending from before 1909 until 1939 as an:

> . . . [I]lluminating slice of history, covering the time of enactment and the first three decades of the 1909 Act, [which] *should not be ignored.* (487 F.2d at 1351; emphasis supplied.)

Moreover, significant events supporting the ALA's argument —that library photocopying is, and always has been, beyond the limited copyright monopoly—occurred after Dr. Putnam's retirement in 1939. The Library of Congress, for example, continued to recognize the need for some measure of reprography particularly for study, scholarship, and research and currently serves its patrons by providing the equipment necessary for photocopying.[13]

And the more recent evidence is not limited to the Library of Congress practices. As pointed out by the majority below, library photocopying has long been recognized as permissible—receiving implicit Congressional approval in 1956 and 1965:

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12. Address to Herbert Putnam, Librarian of Congress 1899-1939, by the American Council of Learned Societies (Washington, D.C., January 27, 1939), second page of text.

13. The Library presently maintains machines which readers may use for photocopying; these machines contain notices saying that *"a single photocopy of copyrighted material may be made only for the purpose of study, scholarship, or research,* and for no other purpose" and "the sale and/or further reproduction of any photocopied copyrighted material is illegal."

> There is other evidence that, until quite recently, library photocopying was carried on with apparent general acceptance. Witnesses in this case testified that such photocopying has been done for at least fifty years and is well-established. The National Library of Medicine Act, in 1956, by which NLM was created (42 U.S.C. § 275 et seq.) provided at § 276(a)(4) that the Secretary of Health, Education, and Welfare, through NLM, should *"make available, through* loans, *photographic or other copying procedures* or otherwise, such materials in the Library as he deems appropriate * * * "; and the Medical Library Assistance Act of 1965 (42 U.S.C. § 280b-1 et seq.) provided that grants be made to medical libraries for, among other things, *"acquisition of duplication devices,* facsimile equipment* * * and other equipment to *facilitate the use of the resources of the* library," 42 U.S.C. § 280b-7. These two pieces of legislation indicate to us that Congress knew in 1956 and 1965 of the practice of library photocopying, and assumed that it was not beyond the pale. (487 F.2d at 1356; emphasis supplied.)

The revealing history outlined above, covering the period from the turn of the century until just recently, clearly warrants a finding that library photography practices were, and remain, outside the intended scope of the limited copyright monopoly.

Clearly, that which was not intended by Congress to be covered by the exclusive rights of Section 1(a), and has never been considered within the reach of those rights, should not now—by judicial action—be brought within that reach. If library photocopying for its salutary purposes is to be subjected to the exclusionary power of a copyright monopoly, the legislature should be the instrument for resolving the delicate balancing of interests that must be faced.

I. C. Recent Decisions of this Court Clearly Require a Holding That Traditional Library Photocopying Is Not Within the Limited Copyright Monopoly

As pointed out above, the legislative history concerning, and the practice for many decades under, the Copyright Act of 1909 clearly suggests that the library photocopying at issue here was never intended to be, and has never been considered to be, within the ambit of the limited copyright monopoly conferred in that Act. The recent decisions of this Court in the CATV cases—*Fortnightly* and *Teleprompter*—provide firm support in a completely analogous context for this conclusion.

In *Fortnightly*, this Court began by pointing out that the Copyright Act is, indeed, limited and not all-encompassing:

> The Copyright Act does not give a copyright holder control over all uses of his copyrighted work. Instead, § 1 of the Act enumerates several "rights" that are made "exclusive" to the holder of copyright. If a person, without authorization from the copyright holder, puts a copyrighted work to use within the scope of one of these "exclusive rights," he infringes the copyright. If he puts the work to a use not enumerated in § 1, he does not infringe. (392 U.S. 393-95, footnotes omitted.)

At issue in the *Fortnightly* and *Teleprompter* cases was whether CATV systems, in utilizing sophisticated electronic equipment to bring copyrighted television programs to viewers who could not otherwise receive such programs, infringed the exclusive "performance" rights granted to the owners of the copyrights in those programs pursuant to Sections 1(c) and 1(d) of the Copyright Act.

That issue is, of course, quite similar to the issue presented herein, namely, whether libraries in utilizing reprographic technology to provide their patrons with access to articles in copyrighted journals in the form of single photocopies (which is

their only practical means of access) infringes the rights granted to the persons claiming ownership of copyrights in those journals pursuant to Section 1(a) of the Act. Just as the activities of CATV were determined to be outside the scope of the copyright monopoly, so should library photocopying be found to be outside the scope of Section 1(a).

The conceptual analogy between the CATV practices and library photocopying is apparent. Both involve a function separate and distinct from the role traditionally played by copyright proprietors. This point was emphasized in *Fortnightly* as follows:

> The function of CATV systems has little in common with the function of broadcasters.*

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* Cf. *Intermountain Broadcasting & Television Corp.* v. *Idaho Microwave, Inc.*, 196 F.Supp. 315, 325:

> "[Broadcasters] and [CATV systems] are not engaged in the same kind of business. They operate in different ways for different purposes. . . ." (392 U. S. at 400.)

What CATV does is, in essence, pick up where the broadcasters leave off. In this sense this Court looked upon CATV as a separate and different medium for dissemination.

And, of course, the same is true of library photocopying. This is tacitly admitted by Petitioner, when it says in its Brief:

> The economic incentive underlying copyright protection is operative when *various media of dissemination, both old and new,* are utilized. Compensation is appropriate whether or not use *in a medium* cuts into income from *established forms of exploitation.* (Pet. Br. at 18; emphasis supplied.)

and is candidly admitted by one of Petitioner's *amici:*

> This systematic reproduction of articles on demand is a *separate medium* for distributing them . . . (Brief of Authors League of America, at 7; emphasis supplied).

It is thus apparent that, in the instant case as in *Fortnightly* and *Teleprompter,* what Petitioner is, in fact, arguing for is an

extension of the copyright monopoly to a medium of dissemination separate and distinct from that traditionally occupied by journal publishers.[14] As was made clear in the CATV cases, such an extension is not automatically made upon the bare assertion that the separate medium is one to which the proprietor's right *should extend*.

In the CATV cases, as noted above, the question at issue was whether CATV activities amounted to a "performance" of the copyrighted television programs within the meaning of the Copyright Act. Obviously, this question could have been treated as one of pure semantics, and on this basis the term "performance" was susceptible of a definition which would include the CATV practices. However, this Court refused to limit its consideration to semantic niceties:

> [O]ur inquiry cannot be limited to ordinary meaning and legislative history, for this is a statute that was drafted long before the development of the electronic phenomena with which we deal here. (392 U.S. at 395; footnote omitted.)

In the same manner, and contrary to the assertions of Petitioner, the instant case cannot and should not be determined on the basis of the *in vaccuo* meanings of the terms "print, reprint, publish, copy and vend" as they appear in Section 1(a) of the Copyright Act. Moreover, in contrast to the situation presented in the CATV cases, the practice at issue here is not one which came into being only recently, making legislative history and the history of the Act's practical application of no value to its interpretation. As has been pointed out above, photocopying or more appropriately, its photographic eqivalent, was being utilized as a separate medium for dissemination at the time of

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14. Another of Petitioner's *amici* confirms the nature of Petitioner's argument and further reveals the motive behind Petitioner's efforts to extend its copyright monopoly:

> The petitioner . . . instituted this action in order to . . . *broaden the financial support* for the ever-increasing costs of privately published, scientific journals . . . (See Brief for American Chemical Society as *amicus curiae* at 16).

the Act's passage and has proceeded without challenge under the Act for many decades. Thus, this case does not present a new technological phenomenon not anticipated by the Act's drafters. Library photocopying was known in 1909 and the language included in Section 1(a) was not intended to embrace this activity.

Petitioner, tacitly admitting the foregoing, nevertheless argues that the present extent of the practice was not quantitatively anticipated. In view of the fact that library photocopying has increased with improvements in reprographic technology, Petitioner's argument continues, it is likely that the practice would have been proscribed if its quantitative parameters had been anticipated. However, as further pointed out in *Fortnightly:*

> But mere quantitative contribution cannot be the proper test to determine copyright liability in the context of television broadcasting . . . Rather, resolution of the issue before us depends upon a determination of the function that CATV plays in the total process of television broadcasting and reception. (392 U.S. at 396-97.)

The same point was made in *Teleprompter*, as follows:

> These shifts in current business and commercial relationships, while of significance with respect to the organization and growth of the communications industry, simply cannot be controlled by means of litigation based on copyright legislation enacted more than half a century ago . . . (39 L.Ed.2d at 430).

The foregoing provides a complete answer to Petitioner's "quantitative" argument. And, even if legislative history and past practice did not so clearly indicate that that library photocopying was outside the copyright monopoly, the "functional" analysis suggested by this Court in *Fortnightly* compels that conclusion.

In the CATV cases, the function of the broadcasters was described as the selection, procurement, and editing of program material, and the dissemination of this material to the public. The role of the CATV companies was described as enhancing

the viewer's capacity to receive the broadcaster's signals through a separate and distinct dissemination medium.

Similarly, publishers select, procure, and edit the articles to be included within their journals. They then market their journals through established channels (subscriptions), knowing in advance who their buyers are, and producing multiple copies in anticipation of demand. Thus, publishers in the total publication and dissemination system are "functionally" like broadcasters in the CATV cases.

Libraries, in photocopying, on the other hand, function much as do the CATV operators. Libraries do not select or procure, other than as incident to normal collection activities—and they do not edit. They merely provide scientists, researchers, and scholars with access to journal articles in the traditional manner in which access has been effected. They supply *single* photocopies, and then only on request and not in inventoried anticipation of a marketplace demand. In the same sense that CATV operators' business is functionally distinct from that of broadcasters, so is the photocopying "business" of libraries separate and distinct from that of journal publishers.

To carry the analogy one step further, in the CATV cases this Court drew a line between broadcasters and viewers, and held that CATV operators fell on the "viewer" side of the line. In this regard, this Court in *Fortnightly* stated:

> It is true that a CATV system plays an "active" role in making reception possible in a given area, but so do ordinary television sets and antennas. CATV equipment is powerful and sophisticated, but the *basic function* the equipment serves is little different from that served by the equipment generally furnished by a television viewer. If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be "performing" the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. The only difference in the case of CATV is that the antenna system is erected and

> owned not by its users but by an entrepreneuer. (397 U.S. at 399-400; emphasis supplied, footnotes omitted.)

Under the same analysis, libraries must be found to be on the "reader" rather than the "publisher" side of the line. It is tacitly admitted by Petitioner that the preparation by a scientist, researcher, or scholar of a copy of journal article for his own use has never been considered to be an infringement under Section 1(a) of the Act, even if the copy were made on a reprographic device rather than by hand. If several scientists purchased a "Xerox" machine for this same purpose, the same conclusion would clearly obtain. The only difference when libraries make the photocopies for them is that the reprographic device is owned by (or leased by) the library. But this arrangement is solely for the convenience of the library's patrons and should not transform a practice always considered to be outside the copyright monopoly into infringement, in spite of any resulting quantitative differential in the number of photocopies. The library is merely performing the time honored function of serving its readers and must be found to fall on the "reader" side of the line.

Ultimately, what was held in both *Fortnightly* and *Teleprompter* was that, if a new, separate, and distinct dissemination medium was to be brought within the copyright monopoly or some alternative accommodation of the interests of broadcasters was to be made, those were jobs for Congress and not this Court. The case for judicial abstention in the face of a plea for extension of the copyright monopoly is even stronger here. The challenged practice—library photocopying—is not one which has been recently engendered by technological innovation. It is a practice which was known to the drafters of the Copyright Act, has been in existence for many decades, and has never been thought to be within the copyright monopoly. A reversal of the decision by the Court of Claims will not simply be a construction of the Copyright Act to prohibit its "evasion because of changing habits due to new inventions and dis-

coveries", as argued by Petitioner (Pet. Br. at 48). It will represent a turning back of the clock almost sixty years to bring within the monopoly a practice not intended to be, and never thought to be, within its ambit.

POINT II

THE DOCTRINE OF FAIR USE PROVIDES A COMPLETE DEFENSE FOR TRADITIONAL LIBRARY PHOTOCOPYING

II. A. Introduction

Even assuming, *arguendo*, that preparation by libraries of single photocopies of articles, or parts of articles, from periodicals is within the ambit of the limited monopoly confered on authors by the Copyright Act of 1909, that traditional practice nevertheless is immunized under the doctrine of fair use. It was this doctrine that the majority of the Court of Claims expressly relied upon in ruling against the claims of Petitioner.

Petitioner, in arguing that library photocopying is a *per se* violation of the Copyright Act to which the fair use defense is inapplicable, attempts to focus merely upon the libraries' role in this activity, attempting to cast them in the light of publishers competing with it. Totally ignored in this simplistic and tortured approach are the interests of those whom the libraries serve, and the fact that those interests have been served for many decades by the very practices challenged. To put the "fair use" question into proper focus—a focus which truly comports with the genesis of library photocopying and explains why it has for so long gone unchallenged—the question must be broken down into two sub-questions:

> *Question 1*: Is it fair use for a scientist, researcher, or scholar to make a single photocopy of an article in a copyrighted journal for use in research or study?
>
> *Question 2*: Assuming the answer to Question 1 is in the affirmative, is the fair use privilege of the scientist,

researcher, or scholar destroyed if the library, acting as his agent, makes the photocopy for him at his request?

Question 1 is the primary issue before this Court in its consideration of the applicability of the fair use defense, and it demands an affirmative answer. The issue posed by *Question 1* is one of first impression, in the sense that no Court has ever been requested to pass upon it previously, although scientists, researchers, and scholars have been making, or obtaining from libraries, single photocopies for many decades.

Once *Question 1* is answered in the affirmative, *Question 2* can be placed in its proper context. Should this Court accept Petitioner's distorted picture of libraries as publishers competing with it and ignore the fair use defense available to their patrons, the incongruous result will be a library being held liable for acts on behalf of persons who have, and always have had, the right to perform those same acts, with the consequent destruction of the fair use defense.

II. B. Fair Use Permits Scientists, Researchers, and Scholars to Make Single Photocopies of Articles in Copyrighted Journals for Use in Research and Study

II. B. 1. Facts

Most, if not all, of the facts which are necessary to a determination of *Question 1* are not in dispute, and will be marshalled and briefly summarized below:

1. Photocopying by scientists, researchers, and scholars is mainly from non-profit journals published by scientific and professional societies.[15]

15. G. Sophar and L. Heilprin, *The Determination of Legal Facts and Economic Guideposts with Respect to the Dissemination of Scientific and Educational Information as it is Affected by Copyright—A Status Report, Final Report,* Prepared by the Committee to Investigate Copyright Problems Affecting Communication in Science and Education, Inc., for the U.S. Department of Health, Education and Welfare, Project No. 70793 (1967) (hereinafter "Sophar and Heilprin Report").

2. There are an overwhelming number of journals published by a multitude of publishers containing articles of interest to scientists, researchers, and scholars.
   a. The NIH Library houses about 150,000 volumes, of which about 30,000 are books and the balance scientific (principally medical) journals. (487 F. 2d at 1347.)
   b. In the biomedical field alone it is estimated that there are in excess of 10,000 journals published. (T. 275.)[16]
   c. It has been estimated that about 1,000 or more publishers originate the bulk of the materials photocopied by scientists, researchers, and scholars. (Sophar and Heilprin Report at 58-60.)
3. In accordance with library policy, library patrons request and are given only one photocopy of a particular article, and never a copy of a whole journal or book. (487 F.2d at 1348.) Petitioner notes (Pet. Br. at 9) that the NIH Library and NLM have policies which limit the nature and extent of their photocopying and allow only a single copy per patron and (Pet. Br. at 10) that "monographs" unlike journal articles, are never photocopied at NIH without permission of the copyright proprietor.
4. Photocopies obtained from libraries are generally used for purposes of research and study. (T. 189-90; 487 F. 2d at 1348.) Petitioner admits (Pet. Br. at 8) that its journal articles are generally photocopied by NIH and NLM for users engaged in medical or scientific research or treatment and that these scientists use such copies in their work. There is absolutely no evidence that any scientists, researchers, or scholars who obtain photocopies from libraries have ever republished the articles or competed in any manner whatsoever with the publisher thereof. (487 F.2d at 1354.) In fact, the majority below found that "On both sides—library and requester—scientific progress, untainted by any

16. As used herein "T" will refer to the trial transcript and the numerals appearing thereafter will denote particular pages thereof.

commercial gain . . . is the hallmark of the whole enterprise of duplication." (487 F.2d at 1354.)

5. Absent photocopying, scientists, researchers, and scholars would be denied access to much of the work published in their fields.

   a. The majority below stated that there is "no doubt . . . that medical science would be seriously hurt if . . . library photocopying were stopped." (487 F.2d at 1356.)

   b. The majority below further found that scientists' demands cannot be met by reprints (487 F.2d at 1356), and that it is unrealistic to expect libraries to purchase untold additional copies or to expect researchers to subscribe to numerous journals. (487 F.2d at 1357.)

   c. A study conducted for the Senate Subcommittee concerned with the revision of the Copyright law reported:

      The various methods of photocopying have become indispensable to persons engaged in research and scholarship, and to libraries that provide research material in their collections to such persons. Effective research requires that the researchers be informed of the findings and opinions of others and have an opportunity to study the materials written by them. These materials are often very extensive and appear in a large number of publications. *It is here that the libraries provide an indispensable service to research by furnishing the individual researcher with the materials needed by him for reference and study.*

      The need of researchers for ready access to a mass of materials is present in every field of scholarly investigation, but the problem is exemplified most clearly in the field of scientific and technical research. *The body of scientific and technical literature has grown so rapidly during the last few decades that it would be extremely difficult for the individual scholar or researcher to gain access to the works he may need to consult unless he can obtain copies*

from a library. This is true especially of periodical literature.

It would be virtually impossible for a person engaged in research to subscribe to all the periodicals which from time to time may touch upon his field of interest, and even the libraries where he lives may be unable to furnish the necessary material. Nor can libraries be expected to meet the needs of any number of researchers by loan of the copies in their collections. In response to the needs of researchers, most major libraries are equipped to provide them with photocopies of materials in the library's collections. *It is invaluable to a researcher to be able to obtain from a central or specialized library photocopies of the various articles he needs for reference and study.* Varner, "Photoduplication of Copyrighted Material by Libraries", Copyright Law Revision Study No. 15, Senate Subcommittee on Patents, Trademarks and Copyrights, 86th Cong., 1st Session. (Emphasis added.)

d. The testimony at trial confirmed the essentiality of photocopies to access:

Q. Am I to understand, then, that the reason for which photocopies were substituted for lending the original journal was to improve the scientist's accessibility to the published scientific record?

A. Yes, I might add, there are two aspects of the word "access" as I would use it there . . .—one is the question of physical accessibility: that is, to produce physical proximity, to place it immediately at an individual's disposal; and the other function that Xerography or photo-duplication does perform is breaking up the scientific record into units and permitting the free assemblage of those units into packages which particularly—relate specifically to the scientist's own complex interests. (T. 824-5.)

e. The testimony at trial also indicated that a scientist, researcher, or scholar could not afford to subscribe

to specific journals which would only occasionally contain articles relating to his field because:

> [O]verall, there are an insufficient number of articles in that specific journal that are of specific interest or use to me . . . (T. 574-5).

f. Copies of many journal issues are available only from libraries, and access to articles therein is available only by means of photocopies. The testimony at trial further shows the problems which inhere in attempting to obtain reprints from authors. One doctor testified that in less than one-third of the cases of requests for reprints was he successful in obtaining same, and that the fraction was even smaller for articles appearing in older journals. (T. 559.) His testimony was confirmed by that of a research technician employed by the National Institute of Health, who stated that from past experience his department did not even attempt to order reprints of articles from journals over three years old, since almost without exception such orders were not filled. (T. 527.)[17]

6. Scientists, researchers, and scholars have been obtaining photocopies of journal articles for at least fifty years, and the practice was well established as far back as 1935. (T. 430-1; Defendant's Exhibit 74.) Indeed, library photocopying appears to date back to the beginning of this century. (487 F.2d at 1355.)

7. There is absolutely no evidence that any publishers suffer a loss in subscription, back volume, or reprint revenue by reason of the obtaining by scientists, researchers, or scholars from libraries of single photocopies of articles appearing in the publishers' journals. (487 F.2d at 1357-58.)

The foregoing facts provide a clear basis for a successful fair use defense on behalf of the scientists, researchers, and scholars

17. Plaintiffs Exhibit 2 contains a notice to the effect that the publisher does not attempt to keep a stock of back issues and cannot guarantee to supply back issues of belated renewals, and that issues of even the current volume "may be out of print at the time the subscription order is received".

who obtain single photocopies of journal articles for practical application in their fields.

II. B. 2. The Law of Fair Use Applied to the Facts

Before applying the doctrine of fair use to the facts set forth above, it is well to have the definition of, and basis for, the doctrine firmly in mind. The Copyright Clause of the Constitution authorizes Congress:

> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings. (U.S. Const.Art.1, § 8).

Even before the creation of our own copyright system, the Courts of England recognized the potential conflicts inherent in a system designed to promote the dissemination of information by granting monopolies in the manner of its expression. In the case of *Sayre* v. *Moore*, 102 Eng.Rep. 139 (K.B. 1785), Lord Mansfield stated:

> We must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits and the reward of their ingenuity and labor; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded. (102 Eng.Rep. at 140)

The judicial doctrine of fair use has been fashioned by the Courts in this country to guard against this latter evil.

A succinct definition of the doctrine is found in the case of *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), wherein the Court remarked:

> "Fair use" is a "privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner * * *" Ball, Copyright and Literary Property 260 (1944). See generally Latman, Fair Use of Copyrighted Works, Study No. 14, prepared for the Sub-

committee on Patents, Trademarks and Copyrights, Senate Comm. on the Judiciary, 86th Cong., 2d Sess. (Comm. Print 1960). The fundamental justification for the privilege lies in the constitutional purpose in granting copyright protection in the first instance, to-wit, "To Promote the Progress of Science and the Useful Arts." U.S. Const.Art.1, § 8. See Mathews Conveyor Co. v. Palmer-Bee Co., 135 F. 2d 73 (6th Cir. 1943); Note, 56 Colum. L.Rev. 585, 595 (1956). To serve that purpose, "courts in passing upon particular claims of infringement must occasionally subordinate the copyright holders' interest in a maximum financial return to the greater public interest in the development of art, science and industry." Berlin v. E.C. Publications Inc., 329 F.2d 541, 544 (2d Cir. 1964). Whether the privilege may justifiably be applied to particular materials turns initially on the nature of the materials, e.g., whether their distribution would serve the public interest in the free dissemination of information and whether their preparation requires some use of prior materials dealing with the same subject matter. Consequently, the privilege has been applied to works in the fields of science, law, medicine, history, and biography. See Latman, supra at 10. (306 F.2d at 306-7.)

It is readily apparent that the question presently under discussion poses exactly the issues referred to above, namely, should the interests of publishers in profit maximization be subordinated to the interests of scientists, researchers, and scholars in furthering art, science, and industry so as to permit the latter to obtain single photocopies of articles in copyrighted journals without the consent of the publisher and notwithstanding the copyright claimed by him, as has been the practice for decades.

The criteria traditionally used to evaluate the question of fair use are well recognized:

a. the purpose of the use;
b. the nature of the copyrighted work;
c. the amount or substantiality of the material used in relation to the copyrighted work as a whole; and
d. the effect of the use on a copyright owner's potential market for his work.

However, the instant case—in presenting a question of first impression—differs from those in which the criteria have heretofore been applied. The distinction is important in view of Petitioner's specious argument that, because entire articles are photocopied, there is a *per se* violation of criterion "c" above and that therefore the other criteria need not even be evaluated. (Pet. Br. at 22 *et seq.*)

The distinction can best be pointed out by reference to the context in which the term "use" appears in criteria "a", "c", and "d" above. What is clearly contemplated is the situation in which the fair use issue commonly arises—portions of a copyrighted work being lifted *and incorporated into another work* which competes to a certain degree with the original. Scientists, researchers, and scholars in contrast, obtain single photocopies of journal articles for purposes of research and study, and *not for publication in other works.* (T. 189-90; 487 F.2d at 1354.) They are not authors seeking to misappropriate the work of earlier authors to their own profit-seeking ends.

Examining the distinction from another standpoint, the doctrine of fair use *presumes access* to earlier works by others planning to write in the same field. It provides a means whereby the earlier works can be used as building blocks to promote science and the useful arts. On the other hand, its concern is that the house that is constructed is not built solely or in too large measure of borrowed bricks. In the case of library photocopying, the activity being challenged *is the obtaining of the normally presumed access.* The "use" made of the works is not of the type with which the doctrine of fair use is usually concerned—no new house is constructed. The bricks thus obtained are, however, used in a manner consistent with the intent of the doctrine. They add to the knowledge of those practicing in the areas of science and the useful arts, and thereby promote progress therein in a most *direct* and *practical* way. Thus, a far stronger case can be made that library photocopying, as traditionally and currently practiced, is *per se* fair use, rather than *per se* unfair use.

The foregoing distinction between use in *other works* versus use in the sense of *access* and *practical application* is clearly recognized in the landmark of *Baker* v. *Selden,* 101 U.S. 99 (1879), wherein this Court stated:

> The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book. And where the art it teaches cannot be used without employing the methods and diagrams used to illustrate the book . . . such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public; not given for the purpose of publication in other works explanatory of the art, but for the purpose of practical application.
>
> * * * * *
>
> On the other hand, the teachings of science and the rules and methods of useful art have their final end in application and use; and this application and use are what the public derive from the publication of a book which teaches them . . . The use of the art is a totally different thing from a publication of a book explaining it. (101 U.S. at 103-4.)

The distinction was also recognized by the majority of the Court of Claims, when it stated:

> There has been no attempt to misappropriate the work of earlier scientific writings for forbidden ends, but rather an effort to gain *access* to the material for study and research. (487 F.2d at 1354, emphasis added.)

The foregoing distinction provides a complete answer to Petitioner's *per se* argument. Moreover, it serves as a framework against which the fair use criteria, *in their relation to this case of first impression,* can be applied.

II. B. 2. a. Purpose of the "Use"

It has been pointed out above that the use made of photocopies by scientists, researchers, and scholars is of the "access-practical application" type, as opposed to the "competing work" type. The practical application thereof is, of course, in the area of science and the useful arts.

As to this area, the fair use doctrine as it relates to "competing work uses" is given its broadest interpretation. As stated in *Loew's Inc.* v. *Columbia Broadcasting System, Inc.* 131 F.Supp. 165 (S.D.Cal. 1955); aff'd. 239 F.2d 532 (9th Cir. 1956); aff'd, 356 U.S. 43 (1958):

> Thus, in the field of science and the fine arts, we find a broad scope given to fair use. "This doctrine permits a writer of scientific, legal, medical and similar books or articles of learning to use even the identical words of earlier books or writings dealing with the same subject matter." . . . The writer of such works "invites reviews, comments and criticism" and we would add, the "use" of the books and portions and quotations therefrom for the purpose of the advancement of learning.
>
> . . . [T]he law permits those working in a field of science or art to make use of ideas, opinions, or theories, and in certain cases even the exact words contained in a copyrighted book in that field [citing cases] This is permitted in order, in the language of Lord Mansfield in Sayre v. Moore, 1 East 361, 102 Eng. Reprint 139 "that the world may not be deprived of improvements, nor the progress of the arts be retarded." In such cases the law implies the consent of the copyright owner to a fair use of his publication for the advancement of the science or art. (131 F.Supp. at 175.)

See also, *Baker* v. *Selden* and *Rosemont Enterprises, Inc.* v. *Random House, Inc., supra.*

It is well recognized, then, that a scientist, researcher, or scholar can *borrow* even the exact words from an earlier copy-

righted work and use them in a new work for the advancement of learning without infringing the copyright:

> The latitude which is permitted a second author within the pale of "fair use" was stated in Sampson & Murdock Co. v. Seaver-Radford Co., 1 Cir. 1905, 140 F. 539, as follows:
>
> > . . . so, also, it is clear that, under some circumstances and for certain purposes, a subsequent publisher may draw from the earlier publication its identical words, and make use of them. *This is peculiarly so with reference to works in regard to the arts and sciences, using those words in the broadest sense*, because, within reference to them, any publication is given out as a development in the way of progress, and, to a certain extent, by common consent, including the implied consent of the first publisher, others interested in advancing the same art or science may commence where the prior author stopped. This includes medical and legal publications, in which the entire community has an interest, and which the authors are supposed to give forth, not only for their own pecuniary profit, but for the advancement of science. *Greenbie* v. *Noble*, 151 F.Supp. 45, 67-8 (S.D.N.Y. 1957; emphasis added).

and,

> Succinctly stated, this doctrine [fair use] permits a writer of scientific, legal, medical and similar books or articles of learning to use even the indentical words of earlier books or writings dealing with the same subject matter. *Thompson* v. *Gernsback*, 94 F.Supp. 453, 454 (S.D.N.Y. 1950).

It is clear, therefore, that a scientist, researcher, or scholar can borrow the exact words from a copyrighted journal article and use them in the publication of a new article dealing with the same subject and competing with the original without incurring liability for copyright infringement.[18] It would be totally

18. To the extent, if any, that some few library patrons depart from the norm in their use of photocopies, and further distribute copies thereof or use their contents in competing works, the copyright proprietors have their rights against "unfair users" and those rights are not insubstantial. If infringement is established, the copy-

anomalous if, when he merely obtained access to these same words in the form of a photocopy, and did nothing with them except refer to them in his research and study, he would be guilty of copyright infringement.[19] The law of copyright does not, and this Court should not, permit a cloak of formalism to mask such a potentially ludicrous state of affairs. At least the same latitude accorded to "competing work users" should be given to "practical application users" seeking access to earlier works by means of photocopies.

II. B. 2. b. Nature of the Copyrighted Works

Photocopying for scientists, researchers, and scholars is mainly from non-profit journals published by scientific and professional societies (Fact 1, p. 28). Authors who contribute articles to such journals typically receive no compensation from the publisher and are interested only in the widest possible dissemination of the results of their research. (T. 669-70.)[20]

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right owner is entitled to: (1) any profits made by the infringer by reason of this infringement under 17 U.S.C. § 101; (2) damages which are set at a statutory minimum of $250 under 17 U.S.C. § 101; and (3) costs and attorneys' fees under 17 U.S.C. § 116. Thus, the copyright owner has effective ways to protect against even minimal infringements, short of mislabelling *every* scientist, reasearcher, and scholar as infringers and burdening libraries with the task of exacting unwarranted tribute from them.

19. As the Court remarked in *Rosemont, supra:*

> We, however, cannot subscribe to the view that an author is absolutely precluded from saving time and effort by referring to and relying upon prior published material. Cf. *Oxford Book Co.* v. *College Entrance Book Co.*, 98 F.2d 688 (2d Cir. 1938). It is just such wasted effort that the proscription against the copyright of ideas and facts, and to a lesser extent the privilege of fair use, are designed to prevent. (366 F.2d at 310.)

20. Only in rare and exceptional cases will even a portion of a monograph be photocopied. (T. 600-604; 844-50; 1329.) The reason for this was explained at trial by the ex-Deputy Director of the National Library of Medicine as follows:

> Now, it is also the rule that an individual scientist contributes a paper without charge. There is no formal contractual relationship between either the society at whose meeting he presents

And, of course, it is precisely when the copyrighted work is of the foregoing nature—relating to science and the useful arts —that the doctrine of fair use is given its broadest definition. *Rosemont, Baker,* and *Loew's, supra.* Thus the application of the second criterion to the facts of the present situation also clearly supports a finding of fair use.

II. B. 2. c. The Amount and Substantiality of the Material Used in Relation to the Whole

It is on this criterion that Petitioner bottoms its *per se* argument. According to Petitioner, each article appearing in a journal is a separate work, and thus, when scientists, researchers, and scholars obtain copies of such articles, they "use" the whole work. Petitioner argues, in essence, that regardless of the other three criteria, this practice cannot possibly be fair use. (Pet. Br. at 22 *et seq.*)

The foregoing argument is without merit for two reasons. First, it is based on a misconception of the basis for the fair use defense. Second, since what is at issue herein is not "use in a competing work" but rather "access-practical application" type

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this paper or the publisher and the individual scientist-author. It is "contributed", a contributed paper. He received no pecuniary reward at all for having contributed—usually; I am speaking in generalizations; this is the usual practice in the sciences—having contributed that paper.

This, therefore, is one economic system. Simultaneously the same scientist lives in another economic system, that of the publication of monographs or textbooks. These—it is the exception where a monograph is contributed. Almost universally it is the subject of a contractual relation between a publisher—and usually a commercial publisher—and the individual author, in which there is a pecuniary award to the author of the monograph.

All that I'm saying, and I'm making a—I'm not trying to get into this in great depth, but all I'm saying is that the whole business of pecuniary award to the creator, and the question of property, is more cogent, is more pertinent, in the field of monographic publishing than it is in the field of scientific journal publishing. (T. 847-49.)

use, the fair use criteria relating to the ratio between the amount borowed and the whole work is only applicable to the former, common type of use not to the latter.

Contrary to Petitioner's position, the doctrine of fair use is not based upon the principle of *de minimis* copying. That is, if more than a *de minimis* amount of a copyrighted work is used (in either sense of the word "used"), this alone does not create *per se* copyright liability. The true relationship between *de minimis* and fair use is described in Cohen, *Fair Use in the Law of Copyright*, ASCAP, COPYRIGHT LAW SYMPOSIUM (No. 6, 1955), at 44, 47, as follows (footnotes omitted):

> It is only when the preliminary questions: is the material copyrightable? was it copyrighted? was it copied? and was enough copied to satisfy the "substantial appropriation" doctrine and to make the *de minimis* doctrine inapplicable? have been answered in the affirmative, that the question of whether there has been a fair use arises . . .

Nimmer on Copyright also acknowledges that the fair use defense is not grounded on the *de minimis* standard:

> . . . It is certainly possible, as do the foregoing definitions in whole or in part, to employ the term fair use as a label for similarity which is not substantial. It is possible, but not very helpful since this approach merely restates the problem of determining substantial similarity, and ignores what may be regarded as the crucial problem of fair use. *That problem arises where it is established by admission or by the preponderance of the evidence that the defendant has copied sufficiently from the plaintiff so as to cross the line of substantial similarity.* The result must necessarily constitute an infringement unless the defendant is rendered immune from liability because the particular use which he made of plaintiff's material is a "fair use". In this more meaningful sense fair use is a defense not because of the absence of substantial similarity but rather despite the fact that the similarity is substantial. (*Nimmer on Copyright*, 1971 ed., pp. 644-5; emphasis added.)

Of course, the foregoing comments relate to the situation where the copied material is used in a new work. If the *de minimis* standard is not applicable to that situation, it is *a fortiori* inapplicable to the *access-practical application* type of use presented herein.

Moreover, in view of this "type of use" distinction, it appears that the criteria relating to the ratio of the amount copied/copyrighted work as a whole is not even applicable to the instant case. The majority of the Court of Claims suggested the inapplicability of this criteria in several ways. First, it listed a number of common, every-day situations where single photocopies of, by Petitioner's definition, whole copyrighted works are obtained for access-practical application purposes, none of which have been challenged as being copyright infringements. Among these are:

1. A lawyer or a Judge obtaining photocopies of recent decisions from copyrighted reports for practical use in connection with litigation; (487 F.2d at 1353.)
2. One Judge making and giving to another a photocopy of a law review article from a copyrighted journal which bears upon a problem they are considering. (487 F.2d at 1353.)

Based on the foregoing situations, to which this Court will relate equally well, the majority below was compelled to conclude in the case before it that:

> There is, in short, no inflexible rule excluding an entire copyrighted work from the area of "fair use". Instead, the extent of copying is one important factor, but only one, to be taken into account, along with several others. (487 F.2d at 1353.)

In arguing against the foregoing position and in favor of its *per se* approach, Petitioner relies upon cases in which copyrighted material was used in *new works*. For example, Petitioner argues at page 24 of its Brief that:

> *Wihtol* and *Benny*, particularly, involved *creative additions* to earlier copyright works.
>
> * * * * *
>
> The court [in *Rosemont*] analyzed the fair use doctrine in terms of [new] *material* which in its "preparation requires some use of prior materials dealing with the same subject matter." (Pet. Br. at 24; emphasis added.)

The instant case does not involve "creative additions" or "new material". Therefore, the cases upon which Petitioner relies are inapposite.

The scientists, researchers, and scholars who obtain single photocopies of a journal article use them for research and study. They do not republish[21] the articles, nor do they incorporate them into new articles. The reply to the question "how much is photocopied?" is "one copy of one article"[22] and that answer

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21. As reported in *National Institute, Inc.* v. *Nutt*, 28 F.2d 132, 134 (D. Conn. 1928), the case of *Nicols* v. *Pitman*, 26 L.R. Ch. Div. 374, recognized the clear distinction between use and republication. In that case the defendant took shorthand notes of a copyrighted lecture and republished the notes as an article in a periodical. The Court held that the audience at the lecture *were at liberty to take the fullest notes for their own personal use*, but not to use them afterwards for the purpose of publishing the lecture for profit.

22. The Copyright Act itself recognizes both *single copies and private use* as exceptions to the limited monopoly which it grants. 17 U.S.C. § 107 states in relevant part:

> . . . During the existence of the American copyright in any book the importation into the United States of any piratical copies thereof or of any copies thereof . . . which have not been produced in accordance with the manufacturing provisions specified in Section 16 of this title . . . is prohibited: *provided, however,* That except as regards piratical copies, such prohibition shall not apply:
>
> * * * * *
>
> (d) To any book published abroad with the authorization of the author or copyright proprietor when imported under the circumstances stated in one of the four subdivisions following, that is to say:
>
> First. When imported, *not more than one copy at one time, for individual use and not for sale;* but such privilege of importation shall not extend to a foreign reprint of a

certainly does not foreclose, *per se*, the defense of fair use on behalf of scientists, researchers, and scholars seeking access to such articles for purposes of practical application.

II. B. 2. d. The Effect of the Use on a Copyright Owner's Potential Market for His Work

In view of the foregoing discussion, this fourth fair use criterion, in the context of this case, is more properly phrased as "The Effect of Scientists, Researchers, and Scholars Obtaining Access to Journal Articles Through Single Photocopies For Purposes of Practical Application On the Market For the Whole Journals". Petitioner candidly speaks (see Pet. Br. at 7) to this issue as follows:

> The effect of unauthorized photocopying cannot be measured exactly in dollars and cents. [omitting transcript reference.] In fact, it is not even clear that anybody could determine whether any particular instances of photocopying would or would not result in the loss of a particular form of revenue by a publisher, such as petitioner. [omitting transcript reference.]

In view of the foregoing admission, it is hardly surprising that the majority of the Court of Claims found that:

> This record simply does not show a serious adverse impact, either on plaintiff or on medical publishers generally,

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book by an American author copyrighted in the United States.

* * * * *

Third. When imported, *for use and not for sale, not more than one copy of any such book* in any one invoice, in good faith *by or for any society or institution incorporated for educational literary, philosophical, scientific or religious purposes, or for the encouragement of the fine arts,* or for any college, academy, school, or seminary of learning, *or for any State, school, college, university, or free public library in the United States.*

Fourth. *When such books form parts of libraries or collections purchased en bloc for the use of societies, institutions* or libraries designate in the foregoing paragraph . . . and are not intended for sale . . . (emphasis added).

> from the photocopying practices of the type of NIH and NLM. In the face of this record, we cannot mechanically assume such an effect, or hold that the amount of photoduplication proved here "must" lead to financial or economic harm. This is a matter of proof and plaintiff has not transformed its hypothetical assumption, by evidence, into a proven fact. (497 F.2d at 1359.)

Perhaps it is due to the weakness of Petitioner's case on this fourth criterion that it contends so strongly for a *per se* approach under the third criterion. It also explains why the Petitioner, in a Procrustean effort, would have this Court read the decision below as requiring it to prove actual damages. However, what the majority of the Court of Claims was doing was merely attempting to assess the effect of photocopying on petitioner's market for its journal subscription, and it found no evidence that the practice had any adverse effect at all.

The reason who no such effect was found should be clear. In the words of one of Petitioner's amici—The Authors League of America:

> This systematic reproduction of articles on demand is a *separate medium* for distributing them; as distinct from the distribution of the original journals as the distribution of mass-market paperback reprint editions is from the sale of the original higher-priced hardcover editions of the same books. (Brief of Authors League of America, *amicus curia* at 7.)

ALA agrees that traditional library photocopying is a separate medium for distribution of journal articles. The medium has been in existence for many decades, and it is the only medium whereby the majority of scholars, researchers, and scientists can obtain access to the articles for purposes of practical application.

Whereas, perhaps in the hardback-paperback situation the effect of one medium upon the other is apparent, there is absolutely no evidence of such an effect in this case. The only relevant testimony shows that photocopies do not supplant originals. An individual can only subscribe to so many expensive journals,

and in many instances a given journal will contain an insufficient number of articles of interest to him to warrant his subscription. (T. 574-5; 487 F.2d at 1357.) Thus, photocopies do not supplant, they supplement, and it does not follow that one who photocopies would otherwise be a subscriber.[23]

Petitioner is thus left with merely the argument, or rather the tautology, that if it received compensation in respect of library photocopying it would be in healthier financial condition. The majority of the Court of Claims made short work of this argument, as follows:

> It is wrong to measure the detriment to plaintiff by loss of presumed royalty income—a standard which necessarily assumes that plaintiff had a right to issue licenses. That would be true, of course, only if it were first decided that the defendant's practices did not constitute "fair use." In determining whether the company has been sufficiently hurt to cause these practices to become unfair, one cannot assume at the start the merit of plaintiff's position, i.e., that plaintiff had the right to license. That conclusion results

23. On the facts of the present case it can be clearly demonstrated that photocopying does not supplant journal subscriptions. From the table at page 36 of the Commissioner's Report, it can be seen that during the 108 day period between September 27, 1967 to Jan. 12, 1968, a total of thirteen copies were made of the eight articles in suit by the two library defendants. The eight articles which were copied appeared in five journal volumes published by plaintiff. Extrapolating these figures, approximately forty photocopies of the article in question would be made yearly, and adding a margin of 25%, this figure would be fifty. If it is assumed for convenience that the fifty copies are divided equally among the five journal volumes, in one year a total of ten copies of articles appearing in any one volume would be made by the two library defendants. In this regard it should be noted that it is *volumes*, not articles, to which plaintiff seeks subscriptions. Further conservatively assuming that the two libraries serve 4000 scientists (this is estimated to be the size of the NLM professional staff, although the NLM serves the whole country), it is seen that the chances of a given scientist photocopying a portion of a given journal in any one year are about 1/400. Can it seriously be contended that given these odds the scientist would subscribe to the expensive journal if photocopies were not available? If he did, it would be on the expectation that in 400 years he would find one article which was useful to him. The question therefore answers itself. Photocopying does not supplant journal subscription.

only if it is first determined that the photocopying is "unfair." (487 F.2d at 1357, n. 19.)

The foregoing point can be emphasized by analogy to the *Fortnightly* and *Teleprompter* CATV cases, *supra.* In those cases, the copyright owners could not prove economic harm through the activities of CATV. CATV merely made the copyrighted programs available to those who could not otherwise view them. The copyright owner's argument was that they should nevertheless be compensated for this use, in a related but separate medium, of the copyrighted programs. The argument must fail here as it did there.

Even if it were assumed, *arguendo,* that the use of photocopies by scientists, researchers, and scholars resulted to a limited extent in a minor loss of potential sales of original journals, this would not be fatal to the defense of fair use. Publishers can claim no inherent or natural rights in the writings of authors. *Fox Film Corp.* v. *Doyal,* 286 U.S. 123, 127 (1932). The Copyright Laws are not intended to codify any moral principle holding the financial interests of publishers inviolate. The end sought by the Copyright Laws is to promote the public interest. Financial incentives are offered only as a means to this end.

The Congressional Report which accompanied the present Copyright Act recognized this objective:

> The enactment of *copyright legislation* by Congress under the terms of the Constitution *is not based on any natural right that the author has in his writings,* for the Supreme Court has held that such rights as he has are *purely statutory rights, but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive right to their writings.* The Constitution does not establish copyright, but provides that Congress shall have the power to grant such rights if it thinks best. *Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. Not that any particular class of citizens, however worthy, may benefit, but because the policy is believed to be for the benefit of*

> *the great body of the people, in that it will stimulate writing and invention, to give some bonus to authors and inventors.* (House Report No. 2222, 60th Cong., 2d Sess., at 6-7; emphasis added.)

And in the case of *Berlin* v. *E. C. Publication, Inc.*, 329 F. 2d 541 (2d Cir. 1964), the Second Circuit expressed the same views, i.e., that profit maximization must give way to the public interest in regard to the Copyright Laws, as follows:

> While indeed broad, the areas in which a copyright proprietor is permitted the exclusive commercial benefits of his copyright work is clearly not without limit. In the words of Article I, Section 8, of the Constitution, copyright protection is designed "To promote the Progress of Science and useful Arts," *and the financial reward guaranteed to the copyright holder is but an incident of this general objective, rather than an end in itself. As a result, courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry.* (329 F.2d at 543-44; emphasis added.)

It is thus manifest that copyright infringement is not established simply upon a showing that the use of a copyrighted work complained of derogates from the copyright owner's goal of profit maximization. The present attack on library photocopying is based solely on a desire for profit maximization, and not upon any necessity to protect the health of the publishing industry. It is an attempt to obtain compensation in respect of a *separate medium* for the dissemination of knowledge for practical application, which has been maintained for many decades, is essential to permit access to such knowledge, and was never before thought to be within the copyright monopoly.

II. B. 2. e. Question 1 Should Be Answered in the Affirmative

It will be recalled that *Question* 1, of first impression in this Court, is:

> Is it fair use for a scientist, researcher, or scholar to make a single photocopy of an article in a copyrighted journal for use in research or study?

From the foregoing analysis of the criteria bearing on fair use in the present context, it will be seen that the "purpose of the use" and the "nature of the copyrighted work" clearly dictate an affirmative answer to this question. It was further demonstrated that the amount photocopied by an individual scientist, researcher, or scholar is not substantial, and that in any event the "how much" criteria is inapplicable to a case where there is only access to, and practical application of, the original material and no republication or incorporation in a competing work. Finally, the lack of evidence of photocopyings' having any adverse effect on the copyright owners' market for its journals was shown. The inference of any such effect, which is the only factor possible militating against a finding of fair use, is of scant importance. The copyright owner's attempt to obtain profit maximization is more than offset by the fact that to deny scientists, researchers, and scholars their traditional right to make single photocopies of journal articles is to deny them access to, and the ability to use, the recorded knowledge in their fields.

Clearly, an affirmative answer to *Question* 1 is warranted on the facts of this case.

II. C The Fair Use Privilege of the Scientist, Researcher, or Scholar Is Not Destroyed When the Library, Acting as His Agent, Makes a Single Photocopy for Him at His Request

From the foregoing discussion, it is clear that it is fair use for a scientist, researcher, or scholar to obtain access to journal articles in the form of single photocopies for purposes of practical

application of their teachings. The second question, it will be recalled, then becomes:

> Is the fair use privilege of the scientist, researcher or scholar destroyed if the library makes the photocopy for him at his request?

II. C. 1. Facts

As before, most of the facts relevant to a determination of Question 2 are not in dispute. These facts are set forth below for convenient reference.

1. "Usually, researchers request photocopies of articles to assist them in their on-going projects". (487 F.2d at 1348.)
2. "[Libraries, pursuant to the General Interlibrary Loan Code] will provide only one photocopy of a particular article, per request, and will not photocopy on any given request an entire journal issue". (487 F.2d at 1348.)
3. ". . . medicine and medical research will be injured by holding these particular [library] practices to be an infringement . . ." (487 F.2d at 1354).

The foregoing are the only facts necessary to require a negative answer to Question 2. Libraries merely act as agents for their patrons and do for them at their request what they themselves have always been privileged to do under the doctrine of fair use. Moreover, libraries exercise care so that they do not, themselves, overstep the bounds of the fair use privilege accorded to their patrons.[24] Thus, it would be anomalous if the library were

24. The Interlibrary Loan Code (See footnote 2, p. 3, *supra*), for example, establishes "responsibilities" for both Borrowing Libraries and Lending Libraries as well as "Conditions on Loans" which generally operate to limit photocopying to materials for use in research and which are not otherwise available to the requesting party. The Code further encourages the use of original works whenever practical and particularly when the amount of material requested is extensive. Thus, there is nothing connected with an interlibrary loan transaction which would bear upon the four criteria used to measure the applicability of the defense in particular circumstances.

held liable on a charge to which its patrons had a complete fair use defense.

II. C. 2. Question 2 Should Be Answered in the Negative

It is clearly apparent why the Petitioner seeks to impose copyright infringement liability upon libraries rather than attacking their readers directly. The reason is simply that almost all (and perhaps every one) of these readers are not infringers but rather are "fair users".

The purported basis for ignoring the fact that libraries are merely agents of readers is that under the Copyright Act, 17 U.S.C. § 1(a), unauthorized "copying" purportedly constitutes the literal standard of infringement. By having library employees operate reprographic machines on behalf of readers, so the argument goes, suddenly it is the libraries and not the readers who are doing the "copying". Somehow, when the *same* reader, for the *same* purposes, asks the library to photocopy the *same* portion of a work for him, instead of borrowing the work and thereupon making a photocopy himself, the reader's fair use is deemed irrelevant.

The illogic of this contention is manifest—the library acts only as the agent of the reader, and its actions do not destroy the fair use privilege that is available to the reader. The fact that the library may be referred to as the "copier" in the latter situation is a semantic nicety of no significance.

This wholly technical approach to library photocopying ignores the true functional relationships of the parties—copyright owners as disseminators of information and readers as users thereof, with libraries serving merely as intermediaries. In *Fortnightly* and *Teleprompter, supra,* this Court had occasion to interpret the literal language of the Copyright Act in light of present day realities. As already pointed out, the present situation is closely

Accordingly, if the requesting scholar is entitled to the fair use defense, that defense is not impaired by the library role of making the requested copy.

analogous to that before this Court in the *Fortnightly* case. The three parties whose interests were before the Court in these CATV cases—the copyright owners, the CATV operator, and the television viewers—were in similar positions to the Petitioner, the libraries,[25] and the readers herein.

The CATV operators there transmitted without license broadcasts of copyrighted materials to viewers who could not otherwise receive them. The question presented was whether this constituted "performance" of the copyrighted works so as to infringe under the literal language of the copyright law. This Court answered this question by rejecting the "quantitative" approach in favor of a functional analysis (392 U.S. at 396-401).

The CATV "middleman" was held not liable for copyright infringement because he did "no more than enhance the viewers' capacity to receive" television broadcasts. Similarly, the "middleman" in the present suit—the library—does no more by photocopying than enhance the researchers' and scholars' access to and use of printed materials, to which such readers have a right under the doctrine of fair use. Thus, both the CATV operator and the library are extensions or agents of the ultimate beneficiaries. A copyright owner could sue a customer of CATV if the customer were to perform the broadcast for profit (as by charging admission to a television reception of a concert of copyrighted music). Likewise, if a reader utilizes a photocopy obtained from a library for purposes outside the realm of fair use, the copyright owners' cause of action lies against the reader and not the intermediary library.

As a practical matter libraries are in no position to raise a fair use defense based on each particular reader's actual manner of utilizing the copied article. Thus, if it is decided that libraries are liable for copyright infringement in respect of photocopying,

25. A distinction that should be kept in mind is that the CATV operator was profiting from its activities, whereas libraries do not profit from photocopying.

they will be faced with the Hobson's choice of either collecting copyright royalties in respect of every page photocopied for every reader regardless of fair use or completely discontinuing the practice of photocopying.

The result of the first of these choices is obvious. It would deprive readers who would be fair users of an opportunity to raise the fair use defense in support of their right to free access to and practical application of works in the library's collection. The only advantage served would be to collect royalties from those very few readers (if any) who would use photocopies for infringing (i.e., non-fair use) purposes. Discontinuance of library photocopying would be even more disastrous to the interests of readers and would be of no benefit to the copyright owners. The results would be a significant lessening in the availability of works in libraries' collections, and a replacement of library photocopying with private copying or with coin-operated copying on the library premises by readers themselves.

If reader photocopying were to be the norm, the copyright owner would be thrown back upon his remedies as against the individual reader. Those readers making a "fair use" of their photocopies would have a defense to such an action, whereas the small number of readers violating the copyright law would be liable for infringement. Since this situation prevails currently, there is absolutely no justification whatsoever for forcing libraries to discontinue their photocopying practices, which are so essential to scientists, researchers and scholars, or for depriving such readers of their right to raise the defense of fair use.

It would perhaps be more convenient for the plaintiff herein to measure and collect royalties at the library level, but the monopoly of the copyright law cannot be enforced for mere convenience. The plaintiff has its rights against the ultimate users of photocopies of its materials, and those rights are not insubstantial.

Moreover, once it is concluded that libraries acting as agents for their patrons are entitled to assert the fair use defense for

single photocopies made available to researchers, scholars, and scientists, it makes no difference whether the requesting patron is present at the library in person or is making the request from some remote location either individually or through a satellite library pursuant to the ALA Interlibrary Loan Program, which is designed to make the country's combined library resources accessible on a nationwide basis. Again the author or publisher is left with his remedies as against those individual readers who misuse materials provided under the program.

The ALA Interlibrary Loan Program may be characterized as a "geographic extension of the library loan desk", which makes it possible for scholars, researchers, and scientists in even the most remote locations to obtain literature relating to their chosen fields of endeavor for practical application therein. Thus, originals and single photocopies of materials are disseminated through small local libraries to scholars unable to come in person to the nation's centers of knowledge.

In *Teleprompter*, this Court considered, in the context of CATV, the effects of geographically extending into remote areas locally permissible service. It was confronted with the contention that to "bring [TV] signals into a community that would not otherwise be receivable on an antenna, even a large community antenna, erected in the area" transformed the CATV systems from nonperformers into performers, thus making them liable for copyright infringement. This Court flatly rejected that approach, stating:

> The reception and rechanneling of these signals for simultaneous viewing is essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer. (39 L.Ed.2d at 426.)

Thus, a CATV system does not lose its status as a nonbroadcaster, and non-performer for copyright purposes, when the signals it carries are those from distant rather than local sources.

Similarly, the process by which one library answers the request of another library by supplying a photocopy pursuant to

interlibrary loan does not alter the balance of interests established herein in favor of fair use. That balance results from application of the four criteria established for fair use, not one of which is affected by the injection of the issue of "distance" into the library single photocopy dissemination practice.

Accordingly, it must be concluded that, if the local practice of supplying a single photocopy to a requesting scholar is fair use, then the Interlibrary Loan Program practice of supplying a single photocopy to a remotely located requesting scholar must also be fair use.

In sum, logic, policy, and precedent support a functional analysis of the parties' relationships in the library photocopying area. That analysis shows the copyright proprietor's position to be nothing more than a thinly veiled attack on the fair use defense enjoyed by scholars, researchers, and scientists for the benefit of the public. Functionally, libraries do nothing more than act as agents or instrumentalities of readers. Libraries should not face exposure to copyright infringement for doing merely what their readers ask them to do.

POINT III

PRACTICAL CONSIDERATIONS

The majority of the Court of Claims seemed well aware of the consequences of a decision for Petitioner. In fact, as will be pointed out below, it expressly considered some of the arguments made to it by the ALA in its *amicus* brief below as to the probable results of such a decision, which it described as follows:

> The result of a flat proscription on library photocopying would be, we feel sure, that medical and scientific personnel would simply do without, and have to do without, many of the articles they now desire, need, and use in their work.*

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*We think the alternative of compulsory licensing is not open to us under the present copyright statute. (487 F.2d at 1357 and n.18.)

The practical considerations which clearly indicate that a decision in favor of Petitioner will result in a "flat proscription on library photocopying" will be discussed below.

III. A. Holding Operation

The decision below takes cognizance of the fact that there are presently under consideration, and have been in the recent past, bills in Congress which would have an important bearing on library photocopying. And Petitioner points out that on July 3, 1974, the Senate Judiciary Committee reported out a Copyright Revision Bill—S. 1361 (amended), 93rd Cong., 2d Sess.—which specifically deals with library photocopying, and which would appear to sanction this practice as it is carried out currently by ALA's members.

ALA can offer no assurance to this Court that such legislation will be enacted within the next few months or as to the ultimate provisions thereof. However, Congress is obviously considering the matter. This is important to keep in mind when focusing upon the practical consequences of the decision in this case. To change the *status quo* and thereby put libraries at the mercy of the copyright proprietors in the interim before Congress acts can have only one salutary effect—when Congress is beseiged by pleas from scientists, researchers, and scholars that they cannot obtain access to the materials they need in their work, Congress may be prompted to move, but in the interim scholarship would be at the mercy of a monopolist's exclusionary potential. That such pleas would assuredly be forthcoming can be seen from the following.

III. B. Library Photocopying Is Clearly Threatened in the Present Suit

Having presented its argument that the instant suit threatens library photocopying as practiced by the ALA's members to the Court of Claims, and that argument having been adequately

summarized and well received by the majority, the ALA will allow the majority to speak to this point on its behalf. Petitioner's counter argument is that all it seeks is reasonable compensation through licensing arrangements. Having considered both sides of the question, the majority stated as follows:

> Plaintiff's answer is that it is willing to license the libraries, on payment of a reasonable royalty, to continue photocopying as they have. Our difficulty with that response—in addition to the absence of proof that plaintiff has yet been hurt, and the twin doubts whether plaintiff has a viable license system and whether any satisfactory program can be created without legislation—is that the 1909 Act does not provide for compulsory licensing in this field. All that a court can do is to determine the photocopying an infringement, *leaving it to the owner to decide whether to license or to prohibit the practice.* Plaintiff and other publishers cannot enjoin governmental libraries (because 28 U.S.C. § 1498, *supra* note 1, is the sole remedy), but *if photocopying of this type is an infringement the owners are free under the law to seek to enjoin any and all non-governmental libraries.* A licensing system would be *purely voluntary* with the copyright proprietor. We consider it entirely beyond judicial power, under the 1909 Act, to order an owner to institute such a system if he does not wish to. We think it equally outside a court's present competence to turn the determination of "fair use" on the owner's willingness to license—to hold that photocopying (without royalty payments) is not "fair use" if the owner is willing to license at reasonable rates but becomes a "fair use" if the owner is adamant and refuses all permission (or seeks to charge excessive fees). (487 F.2d at 1360; emphasis added, footnotes omitted.)

Absent hypothetical license agreements, non-governmental libraries would be compelled to cease immediately all preparation of photocopies. To do otherwise would subject each library to injunctive relief and to minimum statutory relief computed on a per copy basis. As a practical matter, a decision in Petitioner's favor would result in the immediate demise of the Interlibrary

Loan Program and place a majority of the nation's library resources beyond the reach of scholars, scientists, and researchers.

III. C. Royalties on Library Photocopying Would Impose Onerous Economic and Administrative Burdens on Libraries

The majority of the Court Claims, however, stopped short of considering certain other practical consequences of a decision in favor of the Petitioner, even if every owner of a copyright in a professional journal committed not to seek injunctive relief against non-government libraries. Overwhelming economic and administrative burdens would nevertheless ensue for such libraries.

Assuming further, for the sake of argument, that all copyright owners were willing to license photocopying on a "reasonable" basis,[26] it must be recognized that all monies a library may be required to spend in payment for or collection of photocopying royalties must be taken from its other functions, such as acquisitions of new materials to improve its collection. Thus, imposition of royalties on library photocopying would necessarily limit access to written works by decreasing the library's ability to acquire such works.

Moreover, to the extent that the burden of royalties could be passed on to the scientist, researcher, or scholar, such limitations would be even more direct. In this regard, a practicing physician testified in this case that:

> There are great variations in interest in getting an article. I mean, some you must have, and others you say you'd like to have, and so on; and I think all of us have that small germ of persimony, or whatever you call it, and frugality. So that there, very definitely, when you know

26. Back in the real world, as to Petitioner's own proposed licensing plan, the ALA drew the attention of the majority below to the fact that it would not apply to interlibrary loans or to requests from persons not physically present in the library building.

there is going to be a charge, you, if it is a borderline situation, say, "Well, I won't bother." (T. 922-3.)

And most importantly, if the burdens were passed on, the fair use defense which is available to almost every library patron would be a nullity. The library could not determine which few of its patrons were not entitled to this defense and would have to sacrifice the interests of *all* its patrons through the collection of royalties from each of them. This is what Petitioner desires them to do, as it would certainly make plaintiff's life easier and result in a windfall profit to it and other publishers. Using the same rationale, however, the owner of a copyright in a musical composition would be permitted to collect performance fee royalties from *record manufacturers* for *every record* sold by them, regardless of the fact that 99% of such records are sold for in-home use, and only 1% are sold for performance in restaurants, on radio shows, etc. The absurdity of this proposition should not be lost sight of in the context of the present case.

Moreover, regardless of whose pockets the royalty payments come from, the administrative costs to the libraries in merely collecting, accounting for, and distributing the royalties would be substantial and could well exceed the amount of royalties collected. (T. 486-88, 614.) This Court should consider the practical problems which would be involved were an academic, research, or public library to attempt to secure separate royalty agreements for the literally thousands of copyrighted journal items in its collection. It should consider the problems of merely determining with whom the agreement should be negotiated and if one is necessary in respect of a given article. Better yet, this Court should leave such considerations to the legislature, where they can best be accommodated.

An indication of the magnitude of these problems is found in the instant case. Defendants argued that the plaintiff was neither a copyright proprietor nor the real party-in-interest and therefore did not have standing to bring the instant lawsuit. In

support of its position, defendant cited, for example, the agreement relating to copyright between the American Association of Immunologists and Petitioner, under which the Journal of Immunology is published, and which provides in relevant part:

> 5. Procurement of Copyright. The Association is the owner of the periodical but for the convenience of both parties copyright shall be procured by and in the name of the Publisher, and the costs incident thereto shall be charged to the profit-and-loss account of the periodical. *The Association reserves the right to have the copyright assigned to the Association if at any time in the future this seems desirable.* (emphasis supplied.)

The majority below did not consider this question, stating that:

> We assume, for the purpose of the case, but without deciding, that plaintiff is the proper copyright owner and is entitled to sue here . . . (487 F.2d at 1349).

but it further noted that:

> Defendant vigorously contests the publisher's claim to be the copyright "proprietor" and its right to sue in this court. The argument is that the individual authors of the articles are the owners and they have not assigned their rights to plaintiff. (487 F.2d at 1349 n. 5.)

However, assumptions aside, the problems that libraries would encounter in merely determining the person or persons with whom royalty arrangements are to be negotiated for a given article or journal are obvious.[27]

Furthermore, many of the journals photocopied contain much uncopyrighted or uncopyrightable material such as government reports (17 U.S.C. § 8) and public domain material. Of course, whatever copyrights may exist in the journal as a whole do not,

27. Moreover, a copyright notice only identifies the copyright proprietor as of the date of publication. If, in the meantime, the copyright is assigned to another person, or if an individual copyright owner dies, or if a copyright is renewed by someone other than the original owner, the copyright notice necessarily would not reflect the true identity of the copyright owner.

and cannot, cover such material.[28] *Sawyer* v. *Crowell Publishing Co.*, 46 F.Supp. 471 (S.D.N.Y. 1942). However, it would be impossible for a library to determine which articles or material in a supposedly copyrighted journal were properly subject to a claim for photocopying royalties without an undue amount of research and potential dispute with the proprietor. Administrative feasibility would require the libraries to pay or collect royalties on every page photocopied. The result would again be a windfall profit to publishers, and the unwarranted taxation of scientists, researchers, and scholars for access to materials which they are clearly free to use without charge.

And even if those articles in a given journal requiring royalty payments and the proper person with whom rates for that article should be negotiated could be readily identified, this Court should further consider the fact that there are thousands of journals, each containing many articles, in the collections of most of the ALA's members.[29] This further suggests the problems which would inhere in libraries' accounting for royalties due under each separate agreement they negotiate.

The foregoing practical considerations are in no way eliminated by Petitioner's statements that:

> [T]his lawsuit was brought to achieve some legal recognition of the rights of publishers by libraries so that dialogue would be possible with the objective of reasonable financial accommodation of both sides. (Pet. Br. at 29.)

Petitioner has made it clear that it prefers automatic

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28. 17 U.S.C. § 3 clearly recognizes that a composite work covered by a blanket copyright might contain uncopyrighted material:

> The copyright provided by this title shall protect all the *copyrightable components* of the work copyrighted. (emphasis added.)

29. The administrative complexities of negotiating royalty agreements with every owner (assuming he could be identified and located) of every potentially copyrighted work in a library collection are completely beyond comprehension. According to published U.S. Government statistics, in 1969 alone the Copyright Office issued 80,807 new copyright registrations for periodicals. *(Report of the Librarian of Congress*, 1969, p. 97.)

> blanket licensing without any need for record keeping. (Pet. Br. at 37.)

As indicated above, the questions still remain: "Who will the dialogue be between—who are the copyright proprietors?"; "What happens when the dialogue breaks down in individual circumstances?;" "What will be the cost of the dialogue itself?;" "How can blanket licensing make allowances for non-copyrighted materials and for fair use of copyrighted materials?"

There is simply no question that libraries, confronted with the alternative of ceasing all photocopying or seeking royalty agreements from copyright owners, will be forced to choose the former. Absent a legislative scheme that takes into account the proper scholarly objectives of libraries, the problems associated with royalty agreements make it obvious that libraries will really have no alternative.

If, what Petitioner is intimating, but is afraid of suggesting outright, is the advisability of some ASCAP-type of clearing house system, the easy answer is that there is none in existence and, in the words of the majority of the Court of Claims:

> There is also debate over whether a feasible ASCAP-type or clearinghouse system can be developed without legislation and, if so whether it would be desirable. (487 F.2d at 1360 n. 24.)

We close this "practical consideration" section with another quote from the opinion of the majority below, which ties together what has been said above:

> The truth is that this is now preeminently a problem for Congress: to decide the extent photocopying should be allowed, the questions of a compulsory license and the payments (if any) to the copyright owners, the system for collecting those payments (lump-sum, clearing-house, etc.), the special status (if any) of scientific and educational needs. Obviously there is much to be said on all sides. The choices involve economic, social, and policy factors which are far better sifted by a legislature. The possible intermediate solutions are also of the pragmatic kind legislatures, not courts, can and should fashion. (487 F.2d at 1360.)

POINT IV

CONCLUSION

It is submitted that the practice of library photocopying, which has gone unchallenged for many decades, is not within the ambit of the limited copyright monopoly conferred by the Copyright Act of 1909. To the extent there is any doubt on that point, the practice is nevertheless clearly within the privilege of fair use extended to scientists, researchers, and scholars who obtain access to written works by means of single photocopies for purposes of practical application of their teachings. The privilege is not destroyed when a library makes the single photocopy at the request of and for the benefit of the scientist, researcher, or scholar. It is further submitted that the practical consequences of a holding that this traditional practice constitutes copyright infringement would be to completely halt the practice, resulting in a denial of access to recorded knowledge to those persons who would otherwise use it to promote the progress of science and the useful arts.

This Brief *Amicus Curiae* of the American Library Association is filed with the consent of both parties. Letters of consent for filing of both parties are attached hereto as Appendices A and B.

Respectfully submitted,

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APPENDIX A

Law Offices
COWAN, LIEBOWITZ & LATMAN, P. C.
200 East 42nd Street
New York, N. Y. 10017

July 23, 1974

William D. North, Esq.
Kirkland & Ellis
200 East Randolph Drive
Chicago, Ill. 60601

Re: The William & Wilkins Company v. United States,
Supreme Court Docket No. 73-1279

Dear Mr. North:

Pursuant to your request, petitioner, The William & Wilkins Company, consents to the filing of a brief *amicus curiae* in the above matter on behalf of the American Library Association.

Sincerely yours,

/s/ ALAN LATMAN
Alan Latman

AL:DM

APPENDIX B

OFFICE OF THE SOLICITOR GENERAL
Washington, D. C. 20530

July 23, 1974

William D. North, Esq.
Kirkland & Ellis
200 East Randolph Drive
Chicago, Illinois 60601

Re: Williams & Wilkins Co. v. United States, No. 73-1279, October Term, 1973

Dear Mr. North:

In response to the request in your letter of July 19, I hereby consent to your filing a brief amicus curiae in the above-entitled case on behalf of the American Library Association.

Sincerely,

/s/ ROBERT H. BORK
Robert H. Bork
Solicitor General